

### **REMARKS**

Applicant respectfully requests reconsideration. Claims 37 and 39-56 were previously pending in this application. Claim 39 is amended herein. As a result, claims 37, 39-56 are still pending for examination with claims 37, 45-46 and 54 being independent claims. No new matter has been added.

### **Claim Objections**

Claim 39 has been objected to because the claim depends upon itself. Applicant submits that claim 39 has been amended to depend upon claim 37.

The Examiner asserts that claims 37, 40-44, 47-53, 55 and 56 do not represent the elected species of SEQ ID NO: 1 and 6. Applicant respectfully traverses the rejection.

Applicant has reviewed the file history and cannot find any indication that SEQ ID NO 1 and 6 are the elected species. Rather, in response to the Restriction Requirement, the Applicant had elected the following species for X<sub>1</sub>, X<sub>2</sub>, X<sub>3</sub> and X<sub>4</sub>: X<sub>1</sub> = A, X<sub>2</sub> = A, X<sub>3</sub> = T and X<sub>4</sub> = T. Thus, claims 37, 40-44, 47-53, 55 and 56 continue to encompass the elected species.

Accordingly, Applicant requests reconsideration and withdrawal of the rejection and allowance of these claims as no other rejections are pending with the expectation of a provisional double patenting rejection.

### **Rejection Under 35 U.S.C. 102**

Claim 46 has been rejected under 35 U.S.C. 102(e) as being anticipated by Hutcherson et al. (5,723,335) as evidenced by Gura et al. (Science, 1995, 270:575-577). Applicant respectfully traverses this rejection.

The Examiner asserts that Hutcherson et al describes a method of stimulating a local immune response by employing immunopotentiating oligonucleotides and a therapeutic (i.e. vaccine). The Examiner further notes that since every US patent is presumed valid and enabled, the operability of a patent cannot be challenged without a preponderance of the evidence.

Applicant would like to clarify that the operability of the Hutcherson et al patent is not an issue and was never challenged by the Applicant. Instead, Applicant maintains the argument that Hutcherson et al does not teach the skilled artisan to prepare and administer to a human a vaccine including a CpG dinucleotide containing oligonucleotide. Hutcherson et al does not teach that the key component of the immunostimulatory oligonucleotide is an unmethylated CpG dinucleotide. Thus the reference does not provide an adequate teaching to anticipate the claim. If the rejection is based on inherency, the teachings still do not anticipate the claim because the reference does not disclose an example of a vaccine containing a CpG oligonucleotide to a human. Thus, claim 46 is novel in view of Hutcherson et al.

Accordingly, withdrawal of this rejection is respectfully requested.

#### **Double Patenting Rejection**

Claims 45, 46 and 54 have been provisionally rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claim 45 of copending Application No. 11/127,797.

The rejection is a provisional one since claim 45 in the 11/127,797 application has not been found allowable. If the cited claim is found allowable, Applicants will address the rejection.

**CONCLUSION**

A Notice of Allowance is respectfully requested. The Examiner is requested to call the undersigned at the telephone number listed below if this communication does not place the case in condition for allowance.

If this response is not considered timely filed and if a request for an extension of time is otherwise absent, Applicant hereby requests any necessary extension of time. If there is a fee occasioned by this response, including an extension fee, the Director is hereby authorized to charge any deficiency or credit any overpayment in the fees filed, asserted to be filed or which should have been filed herewith to our Deposit Account No. 23/2825, under Docket No. C1039.70083US05.

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Respectfully submitted,

By 

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